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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/758,987	01/16/2004	Jeffrey Douglas Lloyd	61761.US	7899
7590 03/04/2008 LUEDEKA, NEELY & GRAHAM, P.C. P.O. Box 1871 Knoxville, TN 37901				
EXAMINER				
LEVY, NEIL S				
ART UNIT		PAPER NUMBER		
1615				
MAIL DATE		DELIVERY MODE		
03/04/2008		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/758,987

Applicant(s)

LLOYD ET AL.

Examiner

NEIL LEVY

Art Unit

1615

Period for Reply -- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 06 December 2007.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-38 is/are pending in the application.
- 4a) Of the above claim(s) 1-14, 22, 23 and 27-38 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 15-21, 24-26 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☒ Claim(s) 1-38 are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SF/08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 1-14, 22, 23, 27-38 stand withdrawn from further consideration pursuant to 37 CFR 1.142(b), as being drawn to a nonelected invention & species there being no allowable generic or linking claim. Applicant timely traversed the restriction (election) requirement in the reply filed on 7/30/07

. Claim Rejections - 35 USC § 102

Claim15-17, 19-21, 24, 26 stand rejected under 35 U.S.C. 102(b) as being anticipated by TIERNAN et al 5346699

Termites isoptera are controlled by borates (column 5, bottom) applied in a solution as foam spray (column 6, claim 2) to a concrete slab. The concrete is exposed to the termites, & surfaces below it, whether of air or earth, & the concrete would thus be susceptible to termite invasion & tube formation, as that is what termites do.

Claim15-17, 19-21, 24-26 stand rejected under 35 U.S.C. 102(b) as being Anticipated by TOBIN-JP 200/220837.

See abstract-sodium borate applied to polystyrene, applied to concrete, man-made structures, providing termite barrier also is susceptible to termite tube formation, & thus would prevent damage from termites.

Claim15 stands rejected under 35 U.S.C. 102(e) as being anticipated by BARTDORF 6881247

Borate solutions are applied by spraying as coatings on construction materials to protect against termites. Applying the instant compositions could provide the same effects as instantly claimed; prevention of tube formation and termite damage.

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Claim 15, 17, 19, 20, 25, and 26 stand rejected under 35 U.S.C. 102(e) as being anticipated by MANNING et al 7163974

Straw, rice (column 3, lines 27-32) are coated with pesticidal amounts (column 4, lines 50 line- 1 of column 5) of calcium borates (lines 27-42) by incorporation with borates and adhesive solvent (Example) by pressure immersion. The products are non-wood, as they are composites of the cellulose and binder, but are used as building materials. The instant termites would be protected against since the same borates with non-wood components are prepared.

Claim 15, 17, 19, 20, 25, and 26 stand rejected under 35 U.S.C. 102(b) as being anticipated by LLOYD et al 6368529.

As above, non-wood components (column 2, lines 56-61; Example 1) provide cellulosic or wood-resin structural composites (column 3, bottom; column 4, top; and claims) which are termite protected (column 3, lines 60-63).

Claim 15-17, 19, 20, 24-26 stand rejected under 35 U.S.C. 102(e) as being anticipated by LLOYD et al. US 2007/0122442

Solutions of sodium borate [0009] at insecticidal amounts [0015] are incorporated into non-wood components-binder or cellulosic [0017, 0018]. Efficacy is shown against captermes [0033]. Solvent is sufficient water to slurry bider [0019].

Claim 15-17, 19, 20, 24-26 stand rejected under 35 U.S.C. 102(e) as being anticipated by LLOYD et al 6896908

Here, too, lignocellulose (summary) are treated with DOT (column 3, paragraph 3) concentrate (3-45%) solutions at 10-12 times concentrations of the diluted treatment solutions (column 5, top). Lignocellulosic treatment is by spraying, dipping, brushing (column 7, top). As above, inherently, captermes would be protected against.

Claim 15-20, 24-26 stand rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over BLOUNT-6423251 plastics (column 2, top) treated with 15-30% borates (A-1) glycol (column 2, lines 53-54) and water (D) are termiticidal (summary). Building components protected by spraying are paper, fabrics, rubber, cellulose, and plastics (column 5, lines 52-60) to provide coated products (column 7, lines 47-57) such as shingles. See Examples 24, 25.

The same compositions are used by BLOUNT, so would protect in the instant manner.

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Claim 15-17, 19, 20, 24-26 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 18-22 of copending Application No. 10/332549. Although the conflicting claims are not identical, they are not patentably distinct from each other because the treatment is termiticidal, thus providing the claimed effects of the instant application.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Response to Arguments

Applicant's arguments filed 12/06/07 have been fully considered but they are not persuasive. Applicants argue the cited art does not discuss termite tubes & exposed surfaces, however, the cited art does provide coating of surfaces, exposed in some sense, to termite invasion, & thus to tube formation, with application of the instant borate compositions, serving as barriers to termite invasion.

Applicant's arguments re double patenting warrant withdrawal of rejections over the patents.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to NEIL LEVY whose telephone number is 571-272-0619. The examiner can normally be reached on Tuesday-Friday, 7 AM to 5:30 PM EST..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, MICHAEL WOODWARD can be reached on 571-272-8373. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/NEIL LEVY/
Primary Examiner, Art Unit 1615

NEIL LEVY
Primary Examiner
Art Unit 1615
